



Report on the OAH Expedited Hearing Process Under the Minnesota Government Data Practices Act

Fiscal Year 2013

Report to the Legislature

As Required By

2010 Minnesota Laws, Chapter 297, Section 3

<p>CHIEF ADMINISTRATIVE LAW JUDGE:</p> <p>Tammy L. Pust</p>	<p>Report on the OAH Expedited Hearing Process Under the Minnesota Government Data Practices Act</p> <p>August 31, 2013</p> <p>FY 2013 Report to the Legislature</p> <p>As required by 2010 Minnesota Laws, Chapter 297, Section 3</p>
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Cost of Report Preparation

The total cost for the Minnesota Office of Administrative Hearings (OAH) to prepare this report was approximately \$313.50. These costs involved staff time in compiling and analyzing data, and preparing the written report. Incidental costs include paper, copying, and other office supplies.

Estimated costs are provided in accordance with Minnesota Statutes section 3.197, which requires that the cost of preparing a required report must be provided at the beginning of all reports to the legislature.

Executive Summary

In 2010, the Minnesota Legislature authorized the Office of Administrative Hearings (OAH) to provide an expedited hearing to any complainant seeking an order to compel a government agency to comply with the Minnesota Government Data Practices Act (MGDPA or Data Practices Act). Three years of experience with this program has revealed the following:

- Contrary to the expectations of the original proponents of the legislation, most cases heard in the expedited process do not arise from overly protective and legally baseless decisions of government officials; most arise from complicated sets of facts upon which no clear legal precedent is apparent. The OAH decisions in these matters have created clarity in the law, which has reduced the necessity of future litigation.
- The statutory funding scheme is inadequate to support the program as legislatively designed. The \$1000 filing fee has proved insufficient to cover the OAH's costs in all but one matter filed, such that the program has run a statutory operating deficit in all three years of its existence.

The OAH looks forward to working with the 2014 Legislature to further explore the agency's experience with and lessons learned from the program, and to identify and enact a funding mechanism that will ensure the agency's continued ability to produce quality results at a reasonable and necessary public cost.

Program Background

Minn. Stat. § 13.085 allows persons seeking an order compelling a state or local government agency to comply with the Minnesota Government Data Practices Act to request an expedited hearing before an Administrative Law Judge (ALJ) at the OAH. Strict and short statutory timeframes apply to these claims: hearings are held within 30 days of the filing of the complaint and response; decisions are due within 10 days following the close of the hearing record. ALJ determinations are final agency decisions appealable to the Minnesota Court of Appeals.

The OAH has developed a detailed set of procedures and templates for use in these hearings, all of which are available electronically via the OAH website at <http://mn.gov/oah/administrative-law/filing/data/index.jsp>. The agency absorbed all of the costs associated with the development of these resources.

Complexity of Cases

When enacting Minn. Stat. § 13.085, legislators assumed that the disputes that would be presented to OAH would, most often, involve clear-cut cases of intransigence by government officials refusing to provide to the public legally producible data. Directly contrary to this expectation, the filings have instead involved complex and fact-intensive questions of first impression. Among the legal issues presented were the following:

- How detailed must a written release authorizing the disclosure of private data be before it is effective?
- Under what circumstances, if any, may a written release for the disclosure of private data be revoked?
- Is the name of a felon from whom a DNA sample has been drawn a “related record” to the analysis performed on the sample?
- Is appraisal information obtained by a Watershed District during settlement talks with a landowner subject to disclosure, on the grounds that the appraisal was obtained “for the purpose of acquiring land through purchase or condemnation?”
- Is the report of a valuation expert in a condemnation proceeding protected against disclosure as “civil investigative data” or “attorney work product?”
- Following the award of a government contract to a vendor, does all of the data created by lower-tier subcontractors become publicly accessible?
- Are a government lawyer’s litigation notes, as to a case that has been dismissed, exempt from disclosure as “attorney work-product?”
- Is a citizen entitled to an evidentiary hearing as a matter of right to determine whether certain government records exist?

None of these questions admits an easy or quick answer. Accordingly, their resolution involved significant factual disputes and required extensive legal research and analysis.

The chart below details the OAH’s cost experience for the expedited hearing process in fiscal years 2011 through 2013.

Matter	Docket Number	Filing Fees (Total Revenue to OAH)	OAH Staff Hours Required to Resolve Matter	Total Cost to OAH
Schmid, Mike	0305-21608	\$1,000.00	52.0	\$5,752.00
KSTP-TV	0305-21754	\$1,000.00	76.75	\$9,248.00
Stengrim, Jim	0305-21900	\$1,000.00	26.45	\$2,792.00
Four Crown, Inc.	0305-21960	\$1,000.00	48.80	\$5,944.00
FY 11 Totals:		\$4,000.00	204.00	\$23,736.00
Four Crown, Inc.	0305-21960	Paid in FY 11	34.60	\$5,692.58
Sherburne, Daniel	0305-22121	\$1,000.00	13.45	\$2,159.75
Helmberger, Marshall	0305-22159	\$1,000.00	72.20	\$9,798.00
Citizens Information Associate	0305-22638	\$1,000.00	19.00	\$2,004.50
FY12 Totals:		\$3,000.00	139.25	\$19,654.83
In Re: Kyle Prall	0305-30225	\$217.50	2.4	\$217.50
In Re: Utes	0305-30394	\$1,000.00	7.3	\$1,119.50
In Re: Beedle	0305-30450	\$1,000.00	14.9	\$1,812.50
In Re: Gibson*	0305-30695	\$1,000.00	1.8*	\$297.00*
FY13 Totals		\$3,217.50	26.4	\$3,446.50

In the 2013 case of *Shane Gibson v. Kandiyohi County Attorney*, OAH File No. 0305-30695, both a \$1,000 filing fee was received and \$297 of the total case costs were incurred by OAH during Fiscal Year 2013. The total case costs were \$1,699.50. The remaining sums – \$1,402.50 – were incurred in the first month of Fiscal Year 2014, after the reporting period for this report. For that reason, the chart above understates the actual program losses to date.

The only matter filed in Fiscal 2013 as to which OAH did not later suffer a loss was *In Re: Kyle Prall*, OAH File No. 0305-30225. Losses were avoided in that case because it settled out-of-court before significant hearing costs were incurred. The unused portion of the \$1,000 filing fee was returned to the complainant as required by Minn. Stat. § 13.085, subd. 6(c).

Program Funding Deficiency

With regard to most all other types of work except the data practices expedited hearing program, the Administrative Law Division of the OAH operates as an enterprise fund within state government. The cost of hearing services are billed to the client agencies that use our services. The receipts from such charges are then deposited into an Enterprise (Revolving Fund) Account and appropriated back to OAH for payment of employee salaries, benefits and enterprise-related expenses. See, Minn. Stat. §§ 14.53, 14.54.

The MGDPA expedited hearing program is an exception to this general procedure. The OAH has no ability to charge any client agency to recover its costs attributable to the program, and receives no general fund appropriation in support of the program. Instead, the 2010 Legislature intended that the special¹ \$1,000 filing fee would be sufficient to cover the costs of resolving any dispute in the expedited data practices process. As the information above and the chart below reflect, OAH's actual cost experience has been much different than was anticipated.

Receipts and Expenditures for FYs 2011 – 2013

Fiscal Year	Filing Fees or Income	Total Billed Hours	Total Cost	Program Shortfall
FY 2011 Totals:	\$4,000.00	204.00	\$23,736.00	-\$19,736.00
FY 2012 Totals:	\$3,000.00	139.25	\$19,654.83	-\$16,654.83
			(FY 2013 Deficiency Appropriation)	\$36,000
FY 2013 Totals:	\$3,217.50	26.4	\$3,446.50	-\$ 932.00
			Total Shortfall	-\$1,322.83

It appears that the program's funding mechanism is statutorily structured in such a way that the program will never be self-sustaining. In those instances when less than \$1,000 in costs is incurred, OAH is obliged to return the unused portion of the filing fee to the complainant. See, Minn. Stat. § 13.085, subd. 6(c). In those instances when more than \$1,000 in costs is incurred, a deficiency occurs and OAH has no source of revenue to make up the shortfall.

Importantly, the Office of the Legislative Auditor has interpreted the phrase "the chief administrative law judge...shall assess agencies the cost of services rendered to them"

¹ The OAH filing fee is \$50 for all other matters.

in Minn. Stat. § 14.53 as a strict prohibition on cross-subsidization. To comply with this statutory restriction, OAH cannot charge government agencies higher rates so that it can underwrite the services that it provides to MGDPA complainants. Accordingly, if few or none of the MGDPA cases presented to OAH can be resolved for the \$1,000 filing fee, continuing shortfalls will deplete the Enterprise Account and make it more difficult for OAH to efficiently operate within existing resources.

It was for this reason that the 2013 Legislature necessarily appropriated \$36,000 to the OAH in order to cure deficiencies in the program account for the fiscal year just passed. Without statutory changes to the program's funding scheme, similar deficiency appropriations will be necessary on an annual basis.

Fixing the Funding Deficiency: Options for Legislative Consideration

To avoid the necessity of constant deficiency appropriations, the Legislature should consider statutory reform options to recalibrate the cost-recovery mechanism of Minn. Stat. § 13.085. Four options are outlined below.

- (a) Reverse the Cost/Fee Apportionment: The law currently provides that a non-prevailing respondent government agency can be taxed with paying \$1,000 in OAH hearing costs and ordered to pay up to \$5,000 in attorney fees to the complainant. One simple change to the statute would be to reverse the apportionment – requiring non-prevailing agencies to cover up to \$5,000 in OAH hearing costs and limiting the amount of attorney fees that could be recovered by complainants to \$1,000. As \$5,000 represents an approximate gross average of OAH's per case costs, this change would permit OAH to reduce a significant amount of the program shortfalls and also serve as a disincentive for attorneys to unnecessarily extend the length of litigation.
- (b) Appropriate Funds: The Legislature could directly appropriate funds to the OAH sufficient to cover anticipated hearing costs. If it prefers to maintain the Enterprise Fund model in these matters, the appropriation could be directed to the Department of Administration with the direction that the OAH bill that Department to recover all OAH costs, as the agency currently does in other types of administrative law matters.
- (c) Apportion Between Parties: The Legislature could direct that the costs of these proceedings be apportioned between the parties by the ALJ on an equitable basis, in the same manner as the OAH currently apportions necessary costs in municipal boundary adjustment matters pursuant to Minn. Stat. § 414.12, subd. 3. This solution would allow the assigned ALJ to determine on a case-by-case basis what apportionment is just and reasonable.
- (d) Repeal the Statute: If the Legislature concludes that the expedited process has satisfied its original purpose or that the costs associated with the process do not

justify the continued expenditure of public funds, the Legislature could repeal Minn. Stat. § 13.085. Bills to that effect were introduced during the 2013 Legislative Session.²

Conclusion

The Office of Administrative Hearings appreciates the opportunity to submit this report in an effort to provide the legislature with objective data necessary to inform its continuing policy and funding discussions related to this important program. If any further information would be helpful, please do not hesitate to contact Chief Judge Tammy L. Pust at tammy.pust@state.mn.us or (651) 361-7900.

² See House File 814 (Holberg, by request) and Senate File 1419 (Wiklund).